Supreme Court, U.S.
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No. 88-641

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DIANELLA SHIPPING CORPORATION,
IN PERSONAM, and M/V RAJAAN,
Her Engines, Tackle, Apparel, Etc.,
IN REM,

Petitioners,

v.

ALEJANDRO HERNANDEZ,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Respondent Hernandez, being dissatisfied with the presentation of Petitioner, submits the following:

Dianella's Petition presents nothing for review:

I. Respondent's present or future immigration status has no bearing upon the damages Respondent is entitled to recover.

II. Neither the Court of Appeals nor the district court made any determination regarding Respondent's right to remain in the United States. Therefore, there is no conflict with the executive branch of government.

PARTIES INVOLVED

Pursuant to Rule 21.1(b), Rules of the Supreme Court, counsel for Respondent certifies that the following is a list of all parties to the proceeding in the Court whose judgment is sought to be reviewed:

1. Alejandro Hernandez
2. Dianella Shipping Corporation
3. Ishikawajima Harima Heavy Industries, Ltd.
4. O.J.I. Seke-Kogyo Kabushinki Kaisha
5. Cargill Inc.
6. Brazos River Harbor Navigation District
7. Affiliated Rice Mills
8. Trans Ocean America, Inc.
9. Langston Companies, Inc.
10. Amoco Fabrics Company
11. Patchogue Plymouth Division
12. Euro Grain Trading, Ltd.
13. General Produce and Fibres, Ltd.
14. West Texas Rice Company
15. Synthetic Industries Texas, Inc.
16. Texas Employers' Insurance Association
17. The West of England Ship Owners Insurance Services Limited.
18. American International Underwriters

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTION PRESENTED	i
PARTIES INVOLVED	ii
AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	2
FEDERAL STATUTES INVOLVED	2
COUNTERSTATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	3
CONCLUSION	7

AUTHORITIES

CASES:	Page
Culver v. Slater Boat Co., 722 F.2d 114 (5th Cir. 1983)	7
Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984)	3,4,5,6
STATUTES AND RULES OF PROCEDURE:	
8 U.S.C. §1324a(f)	5
33 U.S.C.A. §905(b) (West 1986)	2,5,7
21.1(b), Rules of the Supreme Court	ii

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent requests this Court to deny the Petition for Writ of Certiorari filed herein by Petitioner.

OPINION BELOW

The Findings of Fact and Conclusions of Law, the original opinion of the Court of Appeals for the Fifth Circuit and the per curiam opinion of the Court of

Appeals for the Fifth Circuit on Motion for Rehearing are reproduced in Petitioner's Appendices A, B and C, respectively.

JURISDICTION

Jurisdictional requirements are adequately set forth in the Petition, page 2.

FEDERAL STATUTES INVOLVED

Respondent believes that the only federal statute involved is the Longshoreman and Harbor Workers' Compensation Act, 33 U.S.C.A. §905(b) (West 1986), pertinent parts of which are set forth in the Petition, page 3.

COUNTERSTATEMENT OF THE CASE

The facts material to the question presented appear in the original Opinion of the Court of Appeals for the Fifth Circuit, 841 F.2d 582 (5th Cir. 1988), reproduced in Appendix B of the Petition and the Findings of Fact of the District Court, dated August 5, 1985, unreported, which is reproduced in Appendix A of the Petition.

Petitioner's Statement of the Case omitted the statement of the Court of Appeals regarding the burden of proof as it relates to damage awards for lost earning capacity.

In its per curiam opinion on Petition for Rehearing, the Court of Appeals held that the burden of proof in the calculation of the damages was initially on Hernandez. Such burden required him to establish the damages his injury had caused and was likely to cause in the future. The Court went on to state that only then, when Hernandez had proved his prior wages in

the United States, did the burden shift to Dianella to establish that the use of past wages to calculate future damages was factually improper and, if so, what a proper measure of damages should be. Dianella failed to bring forward such proof and therefore is liable to make Hernandez whole for the injury inflicted.

SUMMARY OF THE ARGUMENT

I. Petitioner's reliance on and application of *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) is misguided. A proper analysis of *Sure-Tan, Inc. v. NLRB* indicates that Respondent's present or future immigration status has no bearing upon the damages Respondent is entitled to recover.

II. Neither the opinion of the Court of Appeals nor the district court established the authority of the district court to determine an illegal alien's right to remain in the United States. The opinion of the district court, affirmed by the Court of Appeals, simply establishes the proper damage award for Respondent's loss of earning capacity, irrespective of his immigration status.

ARGUMENT

I.

Petitioner attempts to use *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), to support the proposition that an illegal alien could not receive lost wages absent a showing that the alien was lawfully available to work. However, Petitioner's use and application of this case is incorrect. Factually, *Sure-Tan* involved an employer's decision to terminate and report to the INS some

illegal alien employees after they attempted to unionize. This prompted action by the NLRB, which fashioned a remedy for the employees which included an order that the employees be reinstated with back pay. On appeal of that order, the Court held that recovery of back pay and reinstatement to employment was contingent upon an alien showing that he could lawfully return to and work in the United States.

The rationale behind the Court's holding was as follows. The Court was concerned with an administrative agency *fashioning* a remedy that directly conflicted with other Congressional mandates. In *Sure-Tan*, the NLRB fashioned a remedy that was directly in conflict with the immigration laws of this country. The remedy would effectively sanction violations of those laws. Congressional and judicial objectives including controlling immigration into this country prohibited the fashioning of such a remedy. The Court also wanted the avoid giving an alien employee favorable economic bias over American workers, albeit under the threat of deportation. Requiring legal documentation to regain terminated employment and recoup back pay satisfies the Court's rationale because it: (1) removes the direct conflict created by the administrative order which, to be enforced, *requires* a violation of Congressional and judicial policy; and, (2) precludes aliens from receiving favorable economic advantages over Americans and removes economic enticements that may lead to illegal immigration. Though the *Sure-Tan* rationale was correct for its particular facts, it is inapplicable to the case before this Court.

Respondent, an illegal alien, was injured by the negligence of a Pakistani vessel while working in the United States, and sought redress. No administrative agency was required to fashion a remedy for Respondent. Congress specifically established his remedy in 33 U.S.C.A. 905(b), a remedy that is in no way in conflict with Congressional mandates or objectives. Devoid from this case are the concerns of economic bias and immigration control that were present in *Sure-Tan*.

A crucial distinction between this case and *Sure-Tan* is that Respondent's quadriplegic state prevents him from working, meaning that he will never benefit from a favorable economic bias over American workers, nor will other workers be enticed to immigrate illegally into this country as a result of the remedy established by Congress. Allowing an undocumented worker to recover damages for work related injuries sustained while actually working in this country does not violate the judicial or Congressional objectives involved in *Sure-Tan*. Thus, Petitioner's argument that Respondent must obtain temporary or permanent resident status is inapplicable to the current case and must be disregarded.

A. The potential that Respondent would ultimately become an illegal employee is irrelevant.

Respondent's injury occurred on September 23, 1983, which meant that the Respondent's employer had legally employed him. Petitioner argues that the 1986 passage of 8 U.S.C. §1324a(f) requires Respondent to qualify for temporary residence status to recover future wages. This section simply imposes criminal liability upon employers of illegal aliens, and in no way pertains to Respondent. Petitioner's ar-

gument is irrelevant because the above analysis under *Sure-Tan* shows that Respondent did not need to qualify to recover these damages, and the employer's potential criminal liability in no way impacts Respondent's ability to recover his damages. It strains credibility to believe that a crime (hiring illegal aliens), which is impossible to commit (Respondent could not work when this Amendment was included), would be dispositive to determine whether Respondent could recover damages to which the courts determined he was rightly entitled.

The Court of Appeals, in its per curiam opinion on Motion for Rehearing, correctly pointed out that "the record demonstrates that Hernandez had been in the United States since 1970 for substantial periods of time and had worked as a longshoreman for almost four years preceding the accident. At the time of the accident, Dianella was accepting Hernandez' labors on the M/V Rajaan without regard to the status of his citizenship. As a private citizen, Dianella's relationship to Hernandez is not the same as the plaintiffs' relationship with their employer in *Sure-Tan*, in which a back pay remedy applied by the National Labor Relations Board was found to implicate labor policy considerations." (Appendix C, page 46a) The Court's decision to grant damages for future lost wages based upon Respondent's employment status at the time of the injury and for the lengthy period preceding his injury was not clearly erroneous. The Court of Appeals so held and went on to state that Dianella "cannot defeat [Hernandez'] right to recover by asserting that his award for future lost wages should be based upon speculation regarding what he might

be earning were he in Mexico." (Appendix C, page 46-47a)

Respondent's immigration status at the time of his injury is simply irrelevant. The only relevant considerations are those considerations that the Court should consider under *Culver v. Slater Boat Co.*, 722 F.2d 114 (5th Cir. 1983), known as *Culver II*, in determining an injured person's lost earning capacity.

II.

Petitioner, in its second argument before this Court, asserts that the opinion of the Court of Appeal erroneously establishes the authority of the district court to determine an illegal alien's right to remain in the United States. Even a cursory reading of the Court of Appeal's opinion in this case indicates that is simply not the fact. The Court of Appeals and the district court have simply established what Respondent's damages for lost wages should be, in light of the evidence presented at the trial court level. Neither the Court of Appeals nor the district court made any determination as to whether or not Respondent was entitled to remain in the United States. As Petitioner properly points out, this is not the function of the district court or the Court of Appeals, nor should it be. Each court should be free to examine the evidence regarding lost earning capacity and award damages based upon that evidence, consistent with the remedy established by Congress in the Longshoreman and Harbor Workers' Compensation Act, 33 U.S.C.A. §905(b) (West 1986).

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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